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**UNITED STATES DISTRICT COURT FOR THE  
CENTRAL DISTRICT OF CALIFORNIA**

GALE SOSTEK; and HERB SOSTEK

Plaintiffs,

vs.

COUNTY OF SAN BERNARDINO;  
SAMUEL FULLER; and DOES 2-10,  
inclusive,

Defendants.

Case No.:

5:23-cv-02236-MRA-MRW

**PLAINTIFFS' OPPOSITION TO  
DEFENDANTS' MOTION TO  
STAY PROCEEDINGS**

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

On March 12, 2023, Plaintiff was fatally shot by Deputy Samuel Fuller of the San Bernardino Sheriff's Department. The shooting occurred near the 800 Block of Vista Ave., in Sugarloaf (Unincorporated BigBear), California, and Decedent was unarmed at the time of the shooting.

Plaintiffs filed their Complaint on October 30, 2023, and it contains claims for relief for: (1) Unreasonable Search and Seizure—Excessive Force (42 U.S.C. § 1983);

1 (2) Unreasonable Search and Seizure—Denial of Medical Care (42 U.S.C. § 1983);  
 2 Substantive Due Process—(42 U.S.C. § 1983); Battery (Survival and Wrongful Death);  
 3 Negligence (Survival and Wrongful Death); and Violation of Bane Act (Cal. Civil Code  
 4 § 52.1).

5 Defendants’ Motion seeks to stay all the proceedings pending the resolution of  
 6 the California Department of Justice’s investigation into the shooting of the unarmed  
 7 Decedent. However, the DOJ’s investigation could take years to conclude, Deputy  
 8 Fuller has not been indicted and there is no evidence that prosecution is imminent.  
 9 Further, the defense and DOJ is not able to provide a timeline for the completion of the  
 10 investigation. Moreover, Plaintiff, Herb Sostek is ninety-one (91) years old and any  
 11 substantial delay may result in Plaintiff passing away before he ever gets his day in  
 12 court, resulting in substantial prejudice to Plaintiff. Accordingly, Defendants’ Motion  
 13 should be denied in its entirety and there should be no stay in the discovery. In the  
 14 alternative, there is no reason why discovery could not proceed with regards to the  
 15 remaining parties and witnesses who are not subject to a DOJ investigation, such as the  
 16 Plaintiffs, the sheriff deputy percipient witness to the shooting, the responding medical  
 17 personnel and the medical examiner.

## 18 **II. LEGAL STANDARD**

19 The Court has discretion to stay civil proceedings in favor of criminal  
 20 proceedings “‘when the interests of justice seem to require such action.’” *Keating v.*  
 21 *Office of Thrift Supervision*, 45 F.3d 322, 324 (9th Cir. 1995) (quoting *United States v.*  
 22 *Kordel*, 391 U.S. 1, 12 n. 27 (1970)). “The Ninth Circuit has held that a stay of civil  
 23 proceedings pending the outcome of ‘parallel criminal proceedings’ is not required by  
 24 the Constitution.” *Ancier v. Egan*, 2015 WL 12684466, at \*1 (D. Haw. Mar. 31, 2015)  
 25 (citing *Fed. Sav. & Loan Ins. Corp. Molinaro*, 889 F.2d 899, 902 (9th Cir. 1989)); see  
 26 also *Keating*, 45 F.3d at 324, 326 (“The Constitution does not ordinarily require a stay

of civil proceedings pending the outcome of criminal proceedings.”) (internal citations omitted). In deciding whether to grant a stay, a court considers “the extent to which the defendant’s [F]ifth [A]mendment rights are implicated.” *Keating*, 45 F.3d at 324. A court also considers the following factors:

(1) the interest of the plaintiffs in proceeding expeditiously with this litigation or any particular aspect of it, and the potential prejudice to plaintiffs of a delay; (2) the burden which any particular aspect of the proceedings may impose on defendants; (3) the convenience of the court in the management of its cases, and the efficient use of judicial resources; (4) the interests of persons not parties to the civil litigation; and (5) the interest of the public in the pending civil and criminal litigation.

*Id.* at 325. Courts apply the *Keating* analysis even when the party seeking the stay has not been indicted. See *Molinaro*, 889 F.2d at 903; *Wroth v. City of Rohnert Park*, 2018 WL 888466, at \*2 (N.D. Cal. Feb. 14, 2018). However, “[t]he case for staying civil proceedings is ‘a far weaker one’ when ‘no indictment has been returned[, and] no Fifth Amendment privilege is threatened.’” *Molinaro*, 889 F.2d at 903 (quoting *SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1376 (D.C. Cir. 1980)).

Courts also apply the *Keating* analysis when a party seeks to stay discovery in light of an actual or potential parallel criminal proceeding. *Estate of Lopez v. Suhr*, 2016 WL 1639547, at \*5 (N.D. Cal. Apr. 26, 2016) (“When a discovery stay is sought in light of an actual or potential parallel criminal proceeding, the Court frames its analysis of whether Defendants have met their “heavy burden” under Rule 26(c) using the framework set forth in *Keating*.”).

### III. ARGUMENT

Defendants seek a stay of all the discovery because Deputy Fuller “will affirmatively invoke his Fifth Amendment right against self-incrimination and not

1 provide any additional testimony until the investigation by the DOJ has concluded” and  
 2 that the defense would “be unable to adequately prepare for trial and establish their  
 3 claims and defenses”. (Motion at 5).

4 In its discretion, the Court may issue a stay of civil proceedings during the  
 5 pendency of criminal matters whenever “the interests of justice . . . require such action.”  
 6 *Keating*, 45 F.3d at 324. When deciding whether the interests of justice require a stay,  
 7 courts typically weigh six factors. *Id.* at 325. After considering each of the *Keating*  
 8 factors, the Court should determine that a stay is not warranted.

9 **A. Extent Which Fifth Amendment Interests are Implicated**

10 Defendants argue that, without a stay, Deputy Fuller’s Fifth Amendment rights  
 11 may be implicated during the DOJ investigation even in the absence of an indictment,  
 12 and that the defense will not be able to “meaningfully participate in the discovery  
 13 process” and “unable to adequately advance this litigation”. (Motion at 6).

14 “While a defendant in a criminal case may constitutionally assert [his] Fifth  
 15 Amendment rights with no adverse consequence, a trier of fact in a civil case may draw  
 16 an adverse inference from invocation of the Fifth Amendment.” *Doe ex rel. Rudy-*  
 17 *Glanzer v. Glanzer*, 232 F.3d 1258, 1264 (9th Cir. 2000). Nonetheless, “[a] defendant  
 18 has no absolute right not to be forced to choose between testifying in a civil matter and  
 19 asserting his Fifth Amendment privilege.” *Keating*, 45 F.3d at 326. Although a  
 20 defendant’s Fifth Amendment right is “an important consideration, ‘it is only one  
 21 consideration to be weighed against others.’” *Sec. & Exch. Comm’n v. Braslau*, 2015  
 22 WL 9591482, at \*2 (C.D. Cal. Dec. 29, 2015) (quoting *Keating*, 45 F.3d at 326).

23 Here, Fuller has not been indicted. As such, Defendants “provide no evidence to  
 24 suggest [Fuller’s] prosecution is imminent,” and thus that further discovery in this  
 25 matter would imperil his right against self-incrimination. *Marshall v. Galvanoni*, 2019  
 26 WL 2552167, at \*3 (E.D. Cal. June 20, 2019). “The case for staying civil proceedings is

1 ‘a far weaker one’ when ‘no indictment has been returned[, and] no Fifth Amendment  
2 privilege is threatened.’” *Molinaro*, 889 F.2d at 903; see also *S.E.C. v. Glob. Express*  
3 *Capital Real Estate Inv. Fund, I, LLC*, 289 Fed. Appx. 183, 191 (9th Cir. 2008) (“The  
4 case for staying civil proceedings is weak when no indictment has been returned.”).  
5 Applying *Keating* and subsequent Ninth Circuit precedent, courts in the Central District  
6 rarely grant stays in the instant procedural posture. See, e.g., *Estate of Morad*, 2017 WL  
7 5187826, at \*9 (C.D. Cal. Apr. 28, 2017) (observing that “*Keating* stays are rarely, if  
8 ever, granted where no indictment has yet been returned” and rejecting request for 120-  
9 day stay in wrongful death / excessive force case); *Perez v. Cty. of Los Angeles*, 2016  
10 WL 10576622, at \*3 (C.D. Cal. May 3, 2016) (“In essence, Defendants ask the Court to  
11 permit any investigation by the DA’s office regarding the possibility of bringing  
12 criminal charges against an officer to stay civil litigation arising out of that officer’s  
13 conduct. The Court finds no basis in either law or reason to create such a rule.”); *Herd*  
14 *v. Cty. of San Bernardino*, 2018 WL 5816175, at \*2 (C.D. Cal. Sept. 17, 2018) (given  
15 that the San Bernardino County DA’s office investigates all officer-involved shootings,  
16 finding “no basis in either law or reason to create a blanket rule requiring a stay of civil  
17 proceedings where there is a mere possibility of criminal charges against the involved  
18 officers”); *Carlson v. City of Redondo Beach*, 2020 WL 7714699, at \*2-3 (C.D. Cal.  
19 Dec. 29, 2020) (in police shooting case, where Defendants made no showing that the  
20 criminal investigation is “wrapping up” or “an indictment is likely to come soon,”  
21 finding it “speculative” that Fifth Amendment rights would be implicated due to a  
22 “possibility” of criminal charges being brought); *Vargas v. Cty. of Los Angeles*, 2019  
23 WL 6655269, at \*2-3 (C.D. Cal. July 10, 2019) (in pre-indictment excessive force  
24 /wrongful death case, finding Defendants “have real but not overwhelming Fifth  
25 Amendment interests” that must be balanced against the other factors and proceeding to  
26 deny request for stay); *Lindsey v. City of Pasadena*, 2017 WL 5891097, at \*3 (C.D. Cal.

1 March 24, 2017) (in excessive force / wrongful death case, without any evidence that  
 2 criminal charges are imminent or any findings from investigating agency that  
 3 Defendants acted unlawfully, holding there is no substantial interference with Fifth  
 4 Amendment rights and denying request for four-month stay); *Christian v. Rutkowski*,  
 5 2015 WL 5456600, at \*2 (C.D. Cal. Sept. 17, 2015) (denying request for stay in officer-  
 6 involved shooting case, finding no substantial interference with Fifth Amendment rights  
 7 absent any evidence that criminal charges were imminent or that any investigating  
 8 agency had found the officer had acted unlawfully).

9 Where, as here, Defendants do not provide evidence from any investigating  
 10 agency that suggests any officer acted unlawfully or that criminal charges are likely or  
 11 imminent, courts in this District routinely find that the burden to grant a stay has not  
 12 been met. See, e.g., *Morad*, 2017 WL 5187826; *Herd*, 2018 WL 5816175; *Vargas*, 2019  
 13 WL 6655269; *Lindsey*, 2017 WL 5891097; *Perez*, 2016 WL 10576622. Further, as the  
 14 CA DOJ explains on the website Defendants reference, it is “required to investigate all  
 15 incidents of an officer-involved shooting resulting in the death of an unarmed civilian in  
 16 the state” pursuant to California Assembly Bill 1506. Current Cases, CA Dep’t Just.,  
 17 <https://oag.ca.gov/ois-incidents/current-cases> (last visited Dec. 28, 2023). CA DOJ “will  
 18 investigate and review for potential criminal liability all such incidents.” *Id.* Given that  
 19 the CA DOJ automatically investigates every one of these incidents, Defendants  
 20 effectively ask the Court to “create a blanket rule requiring a stay of civil proceedings  
 21 where there is a mere possibility of criminal charges against the involved officers.”  
 22 *Herd*, 2018 WL 5816175, at \*2. “The Court finds no basis in either law or reason to  
 23 create such a rule.” *Perez*, 2016 WL 10576622, at \*3.

24 Accordingly, the Court should conclude that the threat to Defendants’ Fifth  
 25 Amendment rights is “remote” and that “Defendants have real but not overwhelming  
 26 Fifth Amendment interests that must be considered in light of the other *Keating*

1 factors[.]” *Vargas*, 2019 WL 6655269, at \*2-3. The first *Keating* factor thus only  
 2 slightly favors a stay.

### 3 **B. Plaintiffs’ Interest in Proceeding Expeditiously**

4 The second *Keating* factor asks the Courts to weigh the Plaintiffs’ interest in  
 5 proceeding expeditiously and the potential prejudice to Plaintiffs if a stay is issued.  
 6 *Keating*, 45 F.3d at 325. Here, Plaintiffs, like all civil plaintiffs, have an “interest in  
 7 having [their] case resolved quickly.” *ESG Capital Partners LP v. Stratos*, 22 F. Supp.  
 8 3d 1042, 1046 (C.D. Cal. 2014). Plaintiffs’ interest in timely proceedings goes beyond  
 9 a general interest in resolving their claims expeditiously. First off, Plaintiff Mr. Sostek  
 10 is ninety-one years old and any significant delay may result in Plaintiff never getting his  
 11 day in court due to his advanced age.

12 Defendants further argue that Plaintiffs will not suffer prejudice as the proposed  
 13 stay. (Motion at 5.). However, Plaintiffs will be prejudiced because Mr. Sostek’s  
 14 advanced age and a stay threatens Plaintiffs ability to secure evidence, witnesses may  
 15 relocate and memories may fade. See, e.g., *Clinton v. Jones*, 520 U.S. 681, 707-708  
 16 (1997) (finding that delay “would increase the danger of prejudice resulting from the  
 17 loss of evidence, including the inability of witnesses to recall specific facts, or the  
 18 possible death of a party”); *Pagtalunan v. Galaza*, 291 F.3d 639, 643 (9th Cir. 2002)  
 19 (holding that unnecessary delay “inherently increases the risk that witnesses’ memories  
 20 will fade and evidence will become stale”); *Sw. Marine, Inc. v. Triple a Mach. Shop,*  
 21 *Inc.*, 720 F. Supp. 805, 809 (N.D. Cal. 1989) (noting that as civil cases are delayed,  
 22 “[w]itnesses relocate, memories fade, and persons allegedly aggrieved are unable to  
 23 seek vindication or redress for indefinite periods of time on end”); *Vargas*, 2019 WL  
 24 6655269, at \*3 (finding that delay “inherently increase[s] the risk that witnesses’  
 25 memories will fade and evidence will become stale”). In an officer-involved shooting  
 26 case like this one, the testimony of a small number of eyewitnesses may be critical; over



1 the indefinite period that Defendants seek to stay the case, witnesses' memories will  
2 surely fade somewhat, prejudicing Plaintiffs. Here, Plaintiffs' case will rely on the  
3 testimony of very few eyewitnesses, including a sheriff's deputy witness (non-shooter)  
4 whom Defendants have produced an interview, and Fuller himself, who Plaintiffs seek  
5 to depose. As time passes, the non-shooting deputy witness and Fuller's memories and  
6 reliability will degrade. See *Morad*, 2017 WL 5187826, at \*8 ("From the Complaint, it  
7 appears that Plaintiffs' case relies strongly on the memories and impressions of  
8 bystanders who watched Officer Hernandez's interactions with Morad. Those memories  
9 likely have already begun to degrade and will only degrade further with the passage of  
10 time. Plaintiffs' ability to prosecute the action thus requires the litigation to move  
11 forward in a reasonably efficient manner.").

12 It should be noted that Defendants' Motion seeks what amounts to an indefinite,  
13 potentially prolonged stay by requesting that the Court stay discovery completely until  
14 the CA DOJ concludes its criminal investigation. However, in this district, indefinite  
15 stays are disfavored. See *Dependable Highway Exp., Inc. v. Navigators Ins. Co.*, 498  
16 F.3d 1059, 1066 (9th Cir. 2007) ("Generally, stays should not be indefinite in nature.").  
17 Further, the Defendants have been unable to secure a timeline from the DOJ itself and it  
18 is not uncommon for these investigations take approximately two years to complete,  
19 which usually resulting with no criminal charges being filed against the shooting  
20 officer(s). The Court should find that this *Keating* factor strongly cuts against a stay.

### 21 **C. Burden on Defendants**

22 The next factor for the Court to consider is the burden on Defendants in the  
23 absence of a stay. *Keating*, 45 F.3d at 325. Defendants argue that Fuller's Fifth  
24 Amendment interests, also the inability to conduct discovery and further litigate the  
25 case imposes a significant burden on them. However, since Defendant Fuller has not  
26 been indicted and since there is no evidence that criminal charges will be filed against



1 Deputy Fuller imminently, there is no significant burden on Defendants if their request  
 2 for a stay is not granted. Further, there is no reason that discovery could be conducted  
 3 against those who do not have Fifth Amendment interest at issue such as percipient  
 4 witnesses, responding medical personnel, the Plaintiffs and the medical examiner. It  
 5 does not make sense that no discovery should be conducted during the CA DOJ  
 6 investigation, which could take a few years to complete.

7 **D. Convenience of the Court and Efficient Use of Judicial Resources**

8 The fourth *Keating* factor assesses whether a stay would be convenient to the  
 9 Court and help conserve judicial resources. *Keating*, 45 F.3d at 325. “Courts have  
 10 recognized that the [fourth] *Keating* factor normally does not favor granting a stay,  
 11 because ‘the court has an interest in clearing its docket.’” *Stratos*, 22 F. Supp. 3d at  
 12 1047 (quoting *Molinaro*, 889 F.2d at 903); see also *Gen. Elec. Co. v. Liang*, 2014 WL  
 13 1089264, at \*6 (C.D. Cal. Mar. 19, 2014) (“[T]his factor typically weighs against the  
 14 granting of a stay”). “This is particularly so where-as here-no indictment has been  
 15 returned and there is no way to predict when the criminal investigation will end.” *Liang*,  
 16 2014 WL 1089264, at \*6 (internal quotations, bracket and citation omitted).

17 Defendants argue that they may be unable to fully participate in the defense of  
 18 the civil matter while the CA DOJ investigation is pending and that the parties would be  
 19 greatly burdened by Deputy Fuller invoking his Fifth Amendment rights with regards to  
 20 any attempted discovery, which could not be resolved until after the criminal  
 21 investigation is complete. However, courts routinely reject these arguments on  
 22 analogous facts. See, e.g., *eBay, Inc. v. Digital Point Sols., Inc.*, 2010 WL 702463, at \*6  
 23 (N.D. Cal. Feb. 25, 2010) (“[T]he extent to which common issues would be resolved in  
 24 a criminal proceeding is speculative when no criminal charges actually are pending”);  
 25 *Mendez v. City of Gardena*, 2014 WL 12802931, at \*5 (C.D. Cal. May 30, 2014)  
 26 (“Although the denial of a stay in this action could lead to the filing of some motions

1 that might not be necessary if a stay were granted . . . defendants have not argued or  
2 shown a likelihood that such motions will proliferate absent a stay. Moreover, a stay  
3 would merely postpone the necessity for filing other discovery motions, such as those  
4 asserting privileges that are not dependent on the pendency of a criminal investigation  
5 or criminal prosecution.”).

6 Here, delaying this matter with a prolonged stay would impair the Court’s ability  
7 to manage its docket. Absent an indictment, any benefits to judicial efficiency are  
8 uncertain at best. Therefore, the Court should find that the fourth *Keating* factor weighs  
9 against a stay.

#### 10 **E. Interests of Non-Parties and the Public**

11 The fifth and sixth *Keating* factors are the interests of non-parties and the public  
12 in obtaining a stay. *Keating*, 45 F.3d at 325. As to non-parties, Defendants argue that  
13 the “non-party DOJ” would be assisted by allowing them time to complete their  
14 investigation without this civil action “which could interfere with the DOJ  
15 investigation.” (Motion at 7). As to the public, Defendants argue that the public has a  
16 strong interest in staying this litigation “because Defendants serve a compelling public  
17 interest by providing public services to the general public”. (Motion at 7). However,  
18 this argument is unpersuasive.

19 Defendants’ arguments are unpersuasive. Many courts adopt the reasoning  
20 which finds that the public interest is best served by the speedy resolution of civil rights  
21 cases such as this one, especially when the case has “received attention from both the  
22 public and the media.” *Morad*, 2017 WL 5187826, at \*9. “It is especially important, in  
23 cases where police misconduct has been alleged, for the public to see justice be fairly  
24 and efficiently done.” *Id.* “Although the public also has an interest in the progress of  
25 criminal investigations, ‘[i]t is hard to see why the indirect societal interest in bringing  
26 to justice the perpetrators of crimes should ever take precedence over the direct interest

1 of the victims of crimes to obtain redress for their losses.” *Herd*, 2018 WL 5816175, at  
2 \*4 (quoting *Int’l Bus. Machines Corp. v. Brown*, 857 F. Supp. 1384, 1391 (C.D. Cal.  
3 1994)). “This is especially true considering no criminal charges have been filed at this  
4 time or any indication that such is likely.” *Id.* Moreover, the Court should be confident  
5 that sufficient safeguards, such as a protective order, can be put in place to shield  
6 sensitive information from disclosure to the public and protect the constitutional rights  
7 of Defendants. Therefore, the final *Keating* factors weigh against a stay.

8 In sum, the totality of the *Keating* factors counsel against the issuance of a stay.  
9 Two of the six factors, even viewed in the light most favorable to Defendants, only  
10 slightly favor a stay. The other four cut against it, some strongly. Thus, a stay is not  
11 currently warranted, and the Court should deny the Motion.

#### 12 **IV. CONCLUSION**

13 For the reasons above stated, the Court should deny Defendants’ Motion for in its  
14 entirety. In the alternative, any discovery stay should be limited only to Defendant  
15 Fuller and not apply to any other witnesses or parties.

16  
17 Respectfully submitted,

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19  
20 Dated: April 15, 2024

By /s/ Eric Valenzuela

Eric Valenzuela

Attorneys for Plaintiffs